Testimony of AFL-CIO General Counsel Jon Hiatt

Before the House Committee on the Judiciary
Subcommittee on Courts, the Internet,
and Intellectual Property

On the
Equal Access to Justice Reform Act of 2005 (H.R. 435)

May 23, 2006

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On behalf of the more than 9 million working men and women of the AFL-CIO, I appreciate the opportunity to testify regarding the Equal Access to Justice Reform Act of 2005 (H.R. 435). In our view, H.R. 435 would seriously weaken enforcement of the National Labor Relations Act, the Occupational Safety and Health Act, the Fair Labor Standards Act and other labor laws, as well as consumer protection laws, environmental laws and other statutes enacted by Congress to promote the public welfare. Because of its likely deterrent effect on legitimate government enforcement activities, we oppose the bill in its present form and urge the Committee to make the revisions necessary to avoid any such impact.

My testimony today will focus on two aspects of H.R. 435 that are the source of our concerns about the impact of the bill on government enforcement activities. The first is the elimination of the requirement that in order to be eligible for an award of attorneys' fees, a prevailing party in an action involving the government must show that the government's position was not substantially justified. The second is the change in the size requirement for eligibility, which would allow entities with a net worth of as much as $10 million -- a category that includes more than 98% of all U.S. firms --to qualify for fee awards.

In order to put the AFL-CIO's concerns about these provisions in proper context, we emphasize at the outset that there are two types of situations in which an award of attorneys' fees to a prevailing party is permitted under the existing statute.

The Equal Access to Justice Act provides a limited exception to the longstanding American Rule, under which each party to litigation pays its own expenses. Under current law, organizations with no more than 500 employees and a net worth of no more than $7 million can recover their fees and expenses if they prevail in administrative or judicial proceedings against the federal government, provided the government's position was not substantially justified. In creating this limited exception to the American Rule, Congress had two goals: to encourage access to administrative forums and the courts by parties who might not otherwise have the resources to seek vindication of their rights, and to deter abusive or marginal enforcement actions by federal agencies. Thus, EAJA allows fee awards both in cases where the government is the defendant – i.e., where a private party has prevailed in an action against the government for denial of a benefit or violation of a right – and in cases where the private party is the defendant—i.e., where the government, acting as a public prosecutor, has brought an action against a private party to enforce a federal law and the private party has prevailed.

Although current law treats both types of cases the same way, from a public policy standpoint they involve two entirely different sets of concerns, and therefore eliminating the "substantially justified" standard and providing for automatic attorneys' fee awards would impact the two types of cases in very different ways.

In the first class of cases, where the private party seeking an attorneys' fee award is the plaintiff, the government has been found to have acted illegally, in violation of the plaintiff's rights. Making attorneys' fees automatically available to the plaintiff in such cases would penalize the government for its wrongful conduct, deter the government from future misconduct, and make it easier for plaintiffs whose rights have been violated to obtain access to courts and administrative forums to vindicate those rights. For that reason, the AFL-CIO agrees with the NAACP, the Leadership Conference on Civil Rights and the American Civil Liberties Union that an amendment to the Act authorizing automatic attorneys' fee awards to prevailing plaintiffs in such cases would serve a salutary public purpose.

In the second class of cases, however, where the government is acting as a public prosecutor and has simply not prevailed in an enforcement action that it was justified in bringing, there is no issue of the government having acted "illegally." Indeed, when the government brings an enforcement action that is substantially justified, not only is it not violating any law, it is doing exactly what Congress intended that it do. Under the National Labor Relations Act, for example, when an unfair labor practice charge is filed with the agency, the General Counsel investigates the charge and issues a complaint if he finds "reasonable cause to believe" that the Act has been violated. Having "reasonable cause to believe" a statutory violation has occurred is also the standard for initiating enforcement actions under numerous other federal statutes, including the Fair Housing Act, the Americans with Disabilities Act, the Agricultural Fair Practices Act, and various whistleblower statutes. Congress has instructed the agencies that enforce these statutes to take enforcement action when that standard is met. Yet perversely, the premise of H.R. 435 seems to be that agencies with enforcement responsibilities like the NLRB need to be *deterred* from bringing enforcement actions even when there is substantial justification for doing so. It is for that reason that the AFL-CIO opposes the bill in its present form. When Congress enacted EAJA, it considered and rejected automatic attorneys' fee awards to prevailing parties precisely because such an approach "did not account for the reasonable and legitimate exercise of government functions and, therefore, might have a chilling effect on proper government enforcement efforts." GAO, "Equal Access to Justice Act: Its Use in Selected Agencies," Jan. 14, 1998, at 9. Instead, Congress crafted the "substantially justified" standard "to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 11. H.R. 435, by eliminating the substantial justification standard and requiring enforcement agencies to pay attorneys' fees whenever they lose an enforcement action, rejects the balance Congress wisely struck in favor of an approach that discourages not just "marginal Federal enforcement actions" -- to quote from the purpose section of the bill – but *all* enforcement actions that an agency is not certain of winning. In our view, this is the wrong message for Congress to send, not just to agencies responsible for enforcing labor and employment protections, but to all federal agencies and departments with enforcement responsibilities.

If the Department of Labor is substantially justified in believing that a company is violating minimum wage or overtime requirements, or its fiduciary duties with respect to a pension plan, we see no possible public purpose could be served by deterring the Department from bringing an enforcement action under the appropriate statute. The same is true if HUD has substantial justification for believing that a company is violating the

Fair Housing Act; the Consumer Product Safety Commission has substantial justification for believing that a company is putting unsafe products on the market, EPA has substantial justification for believing that a company is violating pollution regulations, or the SEC believes with substantial justification that a company is bilking investors. Yet H.R. 435, in its purposes section, characterizes the bringing of an enforcement action in which the agency does not prevail as a form of "misconduct" that should be penalized in a way that deters the agency from bringing any such actions in the future.

Contrary to the premise of the bill, which is that federal agencies are being overly aggressive in their enforcement of regulatory statutes, what the AFL-CIO and its affiliated unions see on a daily basis is a crisis of *underenforcement* of federal statutes intended to protect workers and their families. Chronic underfunding of enforcement activities, a focus on voluntary compliance and "compliance assistance" rather than enforcement, and the pathetically weak penalties that are imposed when enforcement activity is undertaken have combined to create a climate in which businesses can violate basic worker rights with virtual impunity.

Just this past January, the nation witnessed the tragedy at the Sago mine in West Virginia, where 12 coal miners died in an explosion. As the news media reported after the explosion, in the year preceding the tragedy, the Mine Safety and Health Administration had issued 208 citations or orders against the mine operator, 96 of them for serious and substantial violations. But the average penalty for these violations was only $156. In 2001 the Bush administration named as MSHA director a mining company executive who proceeded to withdraw 17 proposed health and safety rules. In coal enforcement, there was a reduction of 190 FTEs between 2001 and 2005. Not surprisingly, the cost of MSHA's neglect of health and safety enforcement has been paid with the lives of miners. Already this year, 26 coal miners have died as a result of mining disasters.

The penalties assessed by the Occupational Safety and Health Administration are as weak as those assessed by MSHA. In FY 2005, the average penalty for a serious violation of the Occupational Safety and Health Act -- one that poses a "substantial probability of death or serious injury" -- was $873. And staffing levels at the agency are so low that at current levels, it would take the agency more than 100 years to inspect each jobsite in America just once. This is despite the fact that millions of workers are injured or made ill each year by hazards on the job, and the number of workplace fatalities averages 15 per day, not including deaths from occupational diseases such as mesothelioma and black lung disease.

Enforcement of basic wage and hour laws is also marginal at best. The Department of Labor employs fewer than 1,000 inspectors to regulate a workforce of 150 million spread out among 7 million separate workplaces. Department of Labor surveys have found that compliance with certain wage and hour requirements in the garment and poultry industries is virtually nonexistent, and violations are rampant in white-collar occupations as well as in low-wage workplaces.

Equally notorious is the lack of effective mechanisms for enforcement of the National Labor Relations Act, which protects the right to organize. Penalties under that statute are so weak — requiring no more than a notice posting for violations as serious as threatening to fire the entire workforce if the employees vote for union representation — that employers regard them as little more than a routine cost of doing business.

Moreover, employers found to have violated worker rights are provided so many opportunities for appeal that it is typically a matter of years before an employer who has illegally fired or disciplined a worker is required to take any remedial action whatsoever. Not surprisingly, as a result of this culture of impunity, a worker is fired every 23 minutes for exercising his or her statutorily protected right to engage in union activity.

Against this backdrop, the notion that Congress should be legislating measures designed to further *reduce* rather than increase regulatory enforcement activity strikes us as a case of severely misplaced priorities.

Neither are we moved by claims that this is a necessary measure to remove unreasonable burdens on small business.

Violations of worker rights occur at workplaces across the United States, in businesses large and small. Just because a business is small does not mean that it is less likely to be hazardous, or that the employer is less likely to violate the law.

The Bureau of Labor Statistics' fatality data – which, unlike injury data, is based upon a government census, and not employer self-reports – shows that in high-risk industries such as construction, small firms account for a disproportionately high percentage of fatal injuries. For example, according to BLS, firms with fewer than 20 employees employed 38.2 percent of the construction workforce but accounted for 55.5 percent of all construction fatalities. (BLS, 2002 Census of Fatal Occupational Injuries). Similarly, a study of Hispanic construction workers in Texas found that 40 percent of fatalities among these workers occurred in establishments of less than 10 employees. (Fabrega and Starkey, Fatal Occupational Injuries among Hispanic Construction Workers of Texas, 1997 to 1999, Human and Ecological Risk Assessment, 2001; 7:1869-1883).

And a study of fatalities among teenage construction workers found a similar result. Sixty three percent of the teenage construction fatalities investigated by OSHA from 1984-1998 occurred at firms with fewer than 11 employees. (Suruda et al., Fatal Injuries to Teenage Construction Workers in the U.S., American Journal of Industrial Medicine, 2003, 44:510-514.

The situation in the mining industry is similar. According to MSHA, 48% of the nation's mines (6,918 out of 14,478), and 28% of coalmines (560 out of 2,800) were very small with 5 or fewer employees. In 2003, 73% of all coal mine fatalities occurred in mines with fewer than 200 employees.

As these statistics indicate, employees of small businesses need vigorous enforcement of the laws to protect their rights on the job. And in any event, the coverage provisions of these bill sweep a vastly greater number of firms than those traditionally considered to be small business. Indeed, the Economic Policy Institute, using data from the Internal Revenue Service and the Census Bureau, estimates that new size requirements in the bill, which would extend coverage to all business with fewer than 500 employees and less than $10 million in net worth, would encompass more than 98% of all firms in the U.S. In contrast, Congress traditionally defines "small business" for the purpose of establishing coverage under a range of other employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have twenty or more employees. 29 U.S.C. § 630(b). Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b), covers employers with fifteen or more employees.

H.R. 435 would provide a monetary incentive for more business to challenge regulatory enforcement actions -- to spare no expense, and to drag out litigation of the case, because at the end of the day they could recover their attorneys' fees and costs if they prevailed.

And the bill would allow even the worst employers -- ones with repeated and egregious violations -- to recover fees if they prevailed on a particular violation. Take for example Eric Ho, who was cited for 11 willful violations of OSHA's respirator and training standards after he exposed his immigrant workforce to asbestos by requiring them to perform building renovation work behind locked gates at night without any respirators or training. Eric Ho was criminally convicted of violating the Clean Air Act. But he succeeded in persuading the Occupational Safety and Health Commission to throw out 10 of the 11 willful OSHA violations, on grounds that OSHA was not allowed to cite Ho for each employee exposed to asbestos hazards, but could only issue one citation. *Secretary of Labor v. Ho,* Nos. 98-1645 & 98-1646 (OSHRC, Sept. 29, 2003). H.R. 435 would require taxpayers to pay the attorneys fees and costs of rogue employers like Eric Ho.

The AFL-CIO has no objections to the portions of H.R. 435 that would require the Attorney General to study and report to Congress on how effective EAJA has been in achieving its intended purpose and to make recommendations as to any reforms believed to be necessary, or to the provisions of the bill eliminating the rate cap, establishing an offer of settlement procedure, or providing assistance to small businesses seeking fee awards. And as noted above, we would also be supportive of amendments to the bill that would eliminate the substantially justified standard in cases where the government as a defendant has been found to have violated the prevailing party's rights.

However, in our view, no rational public policy would be furthered by discouraging government agencies from initiating enforcement actions that are in fact substantially justified but as to which the government ultimately is unable to carry its burden of proof. Thus, as long as H.R. 435 contains such provisions, we will vigorously oppose its enactment into law.

United States House of Representatives

Committee on the Judiciary

F. James Sensenbrenner, Jr., Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(4) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: H.R. 435, "Equal Access to Justice Reform Act of 2005

Date: May 23, 2006

1. Name:

Jonathan P. Hiatt

2. Entity(ies) you are representing:

AFL-CIO

3. Business Address and Telephone Number:

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4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?

☐ YES ☒ NO

5. Have any of the entities that you are representing received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?

☐ YES ☒ NO

6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. *(Please use additional sheets if necessary.)*

7 Signature: Jonathan P. Hiatt

Date: 5/22/06

Bio for Jonathan Hiatt

Jonathan Hiatt is the General Counsel of the AFL-CIO. He was appointed to the position on November 1, 1995, by the Federation's then newly-elected President, John J. Sweeney.

Previously, Hiatt served for eight years as the General Counsel of the Service Employees International Union, based in Washington, D.C., where he directed the union's legal department.

Before that, he was a partner in a union-side labor law firm in Boston, Massachusetts, Angoff, Goldman, Manning, Pyle, Wanger and Hiatt. He joined the firm in 1974, after graduating from Boalt Hall School of Law (University of California at Berkeley) and Harvard College.

Hiatt serves as the Executive Director of the AFL-CIO's national Lawyers Coordinating Committee, and sits on the Board of Directors of the National Employment Law Project, the American Arbitration Association, the Appleseed Foundation, as well as on the D.C. Employment Justice Center and Peggy Browning Fund Advisory Boards.

He currently lives with his family in the Washington, D.C. area.